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NOTE

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I. INTRODUCTION: SETTING THE SCENE OF A COLLISION

On February 4, 1999, a crisp, clear winter night, the United States Navy destroyer, the *U.S.S. Arthur W. Radford* (DD 968), was steaming in slow circles around a calibration buoy in the waters off Cape Henry, Virginia,[1] conducting routine testing like hundreds of Navy ships before her.[2] Unlike her predecessors, however, the *Radford's* testing was to conclude in a manner that was anything but routine.

On that same night, the Saudi Arabian-flagged merchant vessel, the *M/V Saudi Riyadh*, was heading southward from New York City with a cargo of goods bound for Baltimore, Maryland.[3] Her route to Baltimore was to take her south towards Cape Henry, Virginia, where she

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1. *In re* Nat'l Shipping Co. of Saudi Arabia, 147 F. Supp. 2d 425, 430-31 (E.D. Va. 2000).

2. *See* Jack Dorsey, *Court Sorts out a Case of Ship Collision; Navy has Changed Testing Procedures to Avoid Accidents,* THE VIRGINIAN-PILOT, Feb. 4, 2000, at B1.

3. *In re* Nat'l Shipping Co. of Saudi Arabia, 147 F. Supp. 2d at 431.

was to steam into the designated shipping channel, enter the Chesapeake Bay, and head north to her final destination.[4] Unbeknownst to her sleeping crew, her journey was not destined to follow that course.

At 11:35 p.m. E.S.T., the *Radford* and the *Riyadh* collided off the coast of Southeastern Virginia, causing severe damage to both vessels.[5] The *Radford* suffered the more severe damage of the two and limped back to port with her forward deck gun bent and nearly toppled from its mount, and an open gash running from her deck to the waterline.[6] As for the *Riyadh*, she too sustained a wide, saw-like gash running along both sides of her bow, forcing her to substitute a stay in the shipyards for her planned journey to Baltimore.[7]

At the time of the collision, I was serving as a United States Naval Officer onboard the *U.S.S. Hayler* (DD 997), a Norfolk-based sister ship of the *Radford*, and was both shocked and disturbed by the incident. Standing on the deck of my own ship the morning after the collision, watching the wounded *Radford* sail slowly up the Elizabeth River, I distinctly remember asking myself two questions: "How could this happen?" and "What happens next?"

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Roughly two years later, during the early afternoon hours of February 9, 2001, the *U.S.S. Greeneville* (SSN 772), a United States Navy nuclear submarine, was at sea in the waters off the coast of Hawaii.[8] The *Greeneville* was underway for the afternoon with a group of civilians, conducting some routine drills and operations before heading back to port.[9]

Also underway that day in the waters off Pearl Harbor was the Japanese-flagged fishing vessel *Ehime Maru*, a high school training boat from the small town of Uwajima

4. *See* Jack Dorsey, *Ship Crash Trial Risky for Navy*, THE VIRGINIAN-PILOT, Jan. 16, 2000, at B1.

5. *In re* Nat'l Shipping Co. of Saudi Arabia, 147 F. Supp. 2d at 430.

6. Jack Dorsey, *Navy Destroyer, Saudi Ship Damaged In Collision*, THE VIRGINIAN-PILOT, Feb. 6, 1999, at A1.

7. *Id.*

8. John H. Cushman, Jr., *Sub in Collision was Conducting Drill, Navy Says*, N.Y. TIMES, Feb. 11, 2001, at A1.

9. *See id. See also New Clues from the Greeneville*, N.Y. TIMES, Feb. 23, 2001, at A18.

in southwestern Japan.[10] With its crew of two teachers, thirteen students, and roughly twenty fishermen, the tiny vessel was actively engaged in its daily business of fishing for tuna.[11]

At approximately 1:45 p.m. Hawaii time (6:45 p.m. E.S.T.), disaster struck.[12] The *Greeneville*, conducting an emergency surfacing drill, charged up from the depths and rammed into the fishing boat.[13] The impact of the collision sent the smaller craft and nine of its crew to a watery grave, and left the Navy with another set of troubling questions.[14]

Although no longer an active duty Naval Officer at the time, I was still captivated by those events. Sitting at home, watching the incident unfold on CNN, I found myself asking the same questions I had asked only two years earlier, 'How could this happen?' and 'What happens next?'

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The purpose of this paper is to examine the latter of those two questions, specifically focusing on the framework that is in place to deal with the aftermath of a collision at sea involving a United States Naval vessel. However, even though my primary interest involves U.S. Navy collisions at sea, it is important to note that the phenomenon of collisions at sea is not limited to the ships of the U.S. Fleet. In fact, the problems associated with collisions have existed for as long as man has roamed the seas.[15] Today, a fairly intricate set of both international and domestic laws exists to deal with these issues.[16] Such a system is necessary because "[d]espite the widespread use of radar and other sophisticated navigational aids, the schooling of ship's officers in their proper use, and the adoption of traffic separation schemes in congested waterways, marine collisions continue to occur with discouraging frequency."[17]

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10. *See* Christopher Marquis, *9 are Missing off Pearl Harbor after U.S. Submarine Collides with Japanese Vessel*, N.Y. TIMES, Feb. 10, 2001, at A16.

11. *See id.*

12. *Id.*

13. *See id.*

14. *See id.*

15. *See generally* David R. Owen, *The Origins and Development of Marine Collision Law*, 51 TUL. L. REV. 759 (1977).

16. *See id.*

17. Nicholas J. Healy & Joseph C. Sweeney, *Basic Principles of the Law of Collision*, 22 J. MAR. L. & COM. 359, 366 (1991) [hereinafter Healy & Sweeney I].

Thus, in Parts II, III and IV of this paper, I will explore the origins of the legal framework for dealing with collisions at sea, briefly detailing the development of the common law and statutory schemes—both international and domestic—that exist today. Then, in Part V, I will shift my focus to a series of collisions at sea involving the United States Navy, which exemplify some of the essential principles of collision law. Following these discussions, in Part VI, I will undertake an in-depth examination of the court proceedings that flowed from the *Radford/Riyadh* collision mentioned above. Finally, in Part VII, I will conclude this essay with some predictions regarding the possible outcome of the *Ehime Maru* incident.

II. THE DEVELOPMENT OF COLLISION LAW

A. *The Laws of the Ancients*

As with much legal thought and reasoning in our world today, the law of collision has its roots in Ancient Greece.[18] In fact, the earliest known system of maritime laws originated on the Greek island of Rhodes about 300 B.C., and was adopted by the Romans centuries later.[19] The "Rhodian Sea Law," compiled in about 600-800 A.D., was the maritime code of the late Roman Empire, and contains the oldest known incarnation of marine collision law.[20] This

18. *See* Owen, *supra* note 15, at 759. For another discussion of the development of international maritime law, see Gordon W. Paulson, *An Historical Overview of the Development of Uniformity in International Maritime Law*, 57 TUL. L. REV. 1065 (1983).

19. Owen, *supra* note 15, at 759-60. Neither the Ancient Greek nor early Roman incarnations of maritime law contained a specific law of collision. Owen speculates that given the high number of fast, far-ranging ships on the Mediterranean during that period, there certainly must have been collisions, but concludes that such accidents must not have risen to a level deemed worthy of legal notice. After all, the ships of that era did not follow any fixed tracks, and were typically laid up for at least half the year. *Id.* at 760.

20. Id. at 760. The statement, as quoted by Owen, is as follows:

> If a ship in sail runs against another ship which is lying at anchor or has slackened sail, and it is day, all the collision and the damage regards the captain and those who are on board. Moreover, let the cargo too come into contribution. If this happens at night, let the man who slackened sail light a fire. If he has no fire, let him shout. If he neglects to do this and a disaster takes place, he has himself to thank for it, if the evidence goes to this. If the sailsman was negligent and the

early maritime collision code focused primarily on the question of fault (*culpa*), and assigned liability accordingly.[21]

In time, the Roman Empire fell, but trading along the Mediterranean did not cease, and in the stead of the Roman maritime laws came the laws of the medieval city-states. Many of the Mediterranean city-states had some form of maritime code, but only three of those are known to have addressed collision, and overall contributed little to the development of collision law initiated by the Romans.[22]

Maritime codes also developed beyond the confines of the Mediterranean, most prominently in the nations of the North Atlantic Ocean and the North Sea.[23] Both the Rolls of Oleron (c. 1150) and the Laws of Visby (c. 1505), the most notable maritime codes in these regions, set forth a rough framework for dealing with the prospect of a collision.[24] As with their Mediterranean counterparts, the Rolls of Oleron and Laws of Visby concerned themselves primarily with harbor collisions (i.e., collisions between a vessel under sail and a vessel at anchor), testifying to the as yet limited causes and incidences of collisions during those times.[25]

B. *The Influence of English Admiralty*

The next great influence on the development of the law of collision came from the British, who created an Admiralty Court in 1360, when the Lord High Admiral was granted jurisdiction in civil maritime cases.[26] Although created in 1360, continuous records of the Court date only from 1530 and include relatively few collision cases.[27] This

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watchman dozed off, the man who was sailing perished as if he ran on shallows and let him keep harmless him whom he strikes.

Id. at 760-61.

21. *See id.* at 761.

22. *See id.* The three codes were the *Constitutum Usus* of Pisa (c. 1160), the Statutes of Ancona (c. 1350) and the *Consolato del Mare* of Barcelona (c. 1340). *Id.*

23. *See id.* at 762.

24. *See* Healy & Sweeney I, *supra* note 17, at 360. *See also* Owen, *supra* note 15, at 762-64.

25. *Id.* at 763.

26. Healy & Sweeney I, *supra* note 17, at 361. *See generally* Owen, *supra* note 15, at 765-72 (detailing the development of maritime and collision law in Britain from the early sixteenth through the early twentieth centuries).

27. Healy & Sweeney I, *supra* note 17, at 361.

dearth of reported collision cases is ascribable to a number of factors, including the relatively low incidence of collisions and the statutory limitations imposed by the courts of common law.[28] Despite being few in number, however, there were some extremely important cases decided in the English Admiralty court. The most notable being the *Woodrop-Sims* case, decided by Sir William Scott in 1815.[29]

In *Woodrop-Sims*, the judge stated in dicta four basic principles of collision law, three of which remain universally true today.[30] They are: "(1) each vessel bears its own loss in cases of inevitable accident; (2) damages are divided equally when both vessels are to blame; (3) there is no right of recovery when the damaged vessel is alone to blame; and (4) the damaged vessel is entitled to a full recovery when the other is solely at fault."[31] With the exception of the second principle, which was abolished in England in 1911 in favor of the comparative fault rule,[32] the other three remain hornbook collision law today.

C. *The Road to the Modern Law of Collision*

Collision law, as we know it today, originated in the mid-nineteenth century.[33] The tremendous expansion of commerce and navigation that swept the globe at that time resulted in more frequent and more expensive collisions than the world had seen before, and demanded that there be some sort of global consensus regarding how to deal with such occurrences.[34] Perhaps the central figure of this development was Dr. Stephen Lushington, Judge of the English High Court of Admiralty from 1838 to 1867.[35]

During Dr. Lushington's tenure, collision cases became much more frequent for a number of reasons, not the least of which was the expansion of the Admiralty Court's jurisdiction by Parliament.[36] Dr. Lushington, a former Admiralty

28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. For a more thorough discussion of comparative fault (also known as apportionment), see *infra* Part III.D.
33. *See* Owen, *supra* note 15, at 759.
34. *Id.*
35. Healy & Sweeney I, *supra* note 17, at 362.
36. *Id. See also* Owen, *supra* note 15, at 768.

lawyer and member of Parliament until 1841, seized the opportunity presented him, and was the "judicial architect" of the first known set of collision prevention regulations.[37] Among the most important of his innovations was the promulgation of the general rule that when in a meeting or crossing situation, steam powered vessels were to turn starboard (i.e., right) to avoid collision, a rule drilled into the heads of aspiring sailors (including U.S. Naval Officers!) even today.[38]

Not surprisingly, the collision law that developed in England in the mid-nineteenth century also migrated across the Atlantic to America, where it influenced a handful of district court judges deciding the relatively few collision cases emanating from our country at the time.[39] Interestingly, the Supreme Court has had little effect on the development of collision law in this country, having decided its first collision case in 1840, and relatively few since.[40] For the most part, the courts of the United States have been content to follow the lead of their Continental European brethren in this area.[41]

Under the guiding hand of Dr. Lushington, the British began adopting collision regulations in the mid-nineteenth century. The success of these regulations with respect to the Queen's vessels led the British Board of Trade to develop and promulgate a complete set of collision regulations, which they encouraged the rest of the maritime world to adopt.[42] In 1863, the French agreed by treaty to follow the British regulations, and "by 1868, 33 other nations—including the United States—had notified the United Kingdom that their vessels would be bound by the rules, even when outside British waters."[43]

Eventually, the United States Congress decided to make its presence felt as well, enacting legislation relating to navigational lights in 1838 and 1849, and, in 1851, directing the U.S. Navy to enforce a regulation requiring "all

37. *Id.* at 769.

38. *Id.* As for the Naval Officer part, I know that from personal experience. I learned the hard way never to come to port (left) in a meeting situation.

39. *See id.* at 772-73.

40. *Id.* at 777-78. In fact, "[s]ince 1900, the Supreme Court has only decided twenty-three cases that even indirectly involved collision law." *Id.*

41. Healy & Sweeney I, *supra* note 17, at 362.

42. *Id.* at 363.

43. *Id.*

U.S. steam vessels to display a white masthead light and red and green side lights."[44] However, despite the American efforts to add a domestic flavor to these rules, Congress recognized the importance of international uniformity in collision regulations, and in 1864, enacted a set of high seas rules nearly identical to those of their British counterparts.[45] In fact, when the British revised their rules in 1884, Congress was so concerned with this uniformity that it adopted the same rules the following year.[46]

The United States also played host to the first diplomatic conference on navigational rules, which was called by President Benjamin Harrison in 1889.[47] The conference was held in Washington, and resulted in a set of rules known as the International Rules for the Prevention of Collisions at Sea,[48] which "went into effect throughout the world in 1897."[49] Thus, at the advent of the twentieth century, the laws of collision had completed their transformation from a series of obscure regional dictates to a near universal set of maritime laws.

III. KEY CONCEPTS IN COLLISION LAW

A. *Fault-Based Liability*

Since the days of the Roman Empire, liability for collisions at sea has consistently been based upon a finding of fault on the part of one (or both) of the parties involved.[50] Thus, "the fact of collision is not *in itself* a sufficient ground

44. *Id.* at 363-64. These rules have had lasting significance, and the mid-nineteenth century U.S. Navy system of requiring white masthead lights and red and green running lights is still very much in effect today. *See* 33 U.S.C. § 2023.

45. *See* Healy & Sweeney I, *supra* note 17, at 364.

46. *Id.*

47. *Id.*

48. Richard H. Brown, Jr., *General Principles of Liability*, 51 TUL. L. REV. 820, 821 (1977).

49. Healy & Sweeney I, *supra* note 17, at 364. The rules adopted in Washington in 1897 remained in effect and relatively unchanged until 1972, when the COLREGS (1972 Collision Regulations) were adopted. *See infra* Part III.B. for further discussion of the COLREGS.

50. 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 284 (3rd ed. 2001). *See also supra* Part II.A.

for imposing liability."[51] To determine liability, the events of the collision must be measured against the following standards of care: (1) statutory and regulatory rules governing the movement and management of vessels; (2) recognized customs of navigation; and (3) general concepts of prudent seamanship and reasonable care (i.e., negligence).[52] Liability can only be imposed if a violation of at least one of these three standards is found; for, if there is no fault, there can be no liability.[53]

The clearest and most frequent sources of liability are violations of navigation statutes or regulations that result in a collision.[54] Findings of fault, however, are not limited to situations where one or both parties break a codified rule. Breaches of navigational customs can also result in a finding of fault just as easily as the breach of a statute or regulation.[55] Unlike a statutory breach, however, the existence of a given custom must be pleaded and proved as a fact in such cases.[56] Therefore, liability derived from a breach of custom is not as common and not as clear-cut as liability derived from violation of a statute.

Finally, liability can also be imposed even in the absence of a violation of a statute, regulation, or custom, if there is negligence.[57] As in other tort contexts, the test and standard for a finding of negligence in a collision is reasonable care under the circumstances—"i.e., whether the collision could 'have been prevented by the exercise of ordinary care, caution, and maritime skill.'"[58] Obviously, this standard can only be applied on a case-by-case basis considering

51. Brown, *supra* note 48, at 823 (emphasis added).

52. *Id. See also* SCHOENBAUM, *supra* note 50, at 285.

53. *Id.* at 284. In such a "no-fault" situation, referred to as an "inevitable accident," each of the parties involved becomes responsible for their own damages. Schoenbaum, however, notes that today, situations where no fault can be found are "so rare as to be virtually non-existent." Advanced techniques of investigation and the proliferation of statutory and regulatory rules governing shipping makes precise findings of fault and blame increasingly possible. In fact, on ships laden with today's sophisticated navigation equipment, even fog, storms, decreased visibility, and other traditional perils of the sea will not preclude liability for a collision. *Id.*

54. *Id.* at 286.

55. Brown, *supra* note 48, at 824.

56. *Id.*

57. SCHOENBAUM, *supra* note 50, at 285.

58. *Id. See also* Brown, *supra* note 48, at 825 (quoting The Grace Girdler, 74 U.S. 196, 203 (1869)).

the facts at bar. Generally, the highest degree of caution is not required, and reasonable prudence is often deemed sufficient.[59] Thus, an error in judgment will not necessarily be considered negligence; "the mistake must be one that a prudent navigator, sailing under similar circumstances and conditions, would not have made."[60]

B. *The Importance of the "Rules of the Road"*

As noted in Part II.C above, the British codification of a series of collision regulations and the acceptance of those regulations by the global maritime community in the mid-nineteenth century was one of the most significant occurrences in the history of modern collision law. The British precedent is still reflected in the collision rules governing the seas today. In fact, the navigation/collision prevention regulations currently in force in international waters were adopted at a diplomatic conference held (fittingly) in London in 1972.[61] The end-result of that conference was the promulgation of the "COLREGS," a set of international collision regulations that took effect in July 1977.[62] To date, most maritime nations, including the United States, have enacted statutes applying the COLREGS not only to international waters, but to their local/internal waters as well.[63]

The importance of the COLREGS in the realm of collision law cannot be understated. One commentator notes that "[t]he COLREGS. . . are not mere prudential regulations or guidelines; they are binding enactments that must

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59. *Id.* at 825. *See also* SCHOENBAUM, *supra* note 50, at 285-86.

60. Brown, *supra* note 48, at 826.

61. Healy & Sweeney I, *supra* note 17, at 364. The 1972 Regulations have been amended a few times since then (in 1983 and 1989), but have remained generally the same. *Id.*

62. *Id.* "COLREGS" is short form for the original title: International Regulations for Prevention of Collisions at Sea. It is also interesting to note that the COLREGS were the first set of collision regulations adopted in the form of an International convention. The convening authority for the conference that gave birth to these regulations was a specialized agency of the United Nations, today known was the International Maritime Organization (IMO). *See id.*

63. *See id.* at 365. The 1972 COLREGS are codified at 33 U.S.C. §§ 1601-1608 (1994). Also interesting to note is that in the United States, prior to 1982, there were *three* sets of statutory rules for inland waters, the "Inland Rules," the "Western River Rules," and the "Great Lakes Rules." Today, all inland waters in the U.S. are governed by the "Uniform Inland Rules," which are strikingly similar to their international COLREGS counterpart. *See* 33 U.S.C. §§ 2001-2073.

be adhered to closely."[64] The existence of such a comprehensive set of rules and regulations has understandably had important legal consequences.[65] As mentioned in the previous section, findings of fault based on a violation of these regulations are the most frequent of any source of liability. Additionally, since the rules are international in scope, they are often interpreted by other maritime nations, such as Great Britain and Canada. It is not uncommon for American judges to consult the decisions of their foreign counterparts, especially in areas where domestic authority may be comparatively slight.[66] Thus, an understanding of these regulations is essential for any intelligent discussion of collisions at sea.

C. *The* Pennsylvania *Burden-Shifting Rule*

The importance of statutory schemes like the COLREGS as an aid in determining fault in collision cases is universally accepted. In fact, in some legal systems, violation of a collision regulation by a given vessel can lead to a strong presumption that the vessel was the cause of the collision. The United States is one such system as a result of the "*Pennsylvania* Rule," which was announced by the Supreme Court in an 1874 decision involving a vessel of that name.[67] The doctrine holds as follows:

> The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship

64. SCHOENBAUM, *supra* note 50, at 287. Brown takes this idea one step further, noting that "[f]or many years, the [COLREGS] have provided a comprehensive regulatory scheme covering almost every aspect of a ship's navigation vis-à-vis other vessels on the high seas, including specifications for lights and day shapes for every description of vessel, regulations for sound signals, and conduct in both clear weather and restricted visibility—in short, all major aspects of collision avoidance." Brown, *supra* note 48, at 822.

65. *Id.* at 823. With respect to their comprehensiveness, the rules cover everything from big picture collision avoidance to such detailed requirements as the range and arc of visibility for a vessel's required lights. *See generally* 33 U.S.C. §§ 1601-1608.

66. Brown, *supra* note 48, at 823.

67. Nicholas J. Healy & Joseph C. Sweeney, *Establishing Fault in Collision Cases*, 23 J. MAR. L. & COM. 337, 338 (1992) [hereinafter Healy & Sweeney II].

> of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.[68]

Thus, under the rule, once it is established that a vessel is guilty of violating a statute or regulation, the burden of proof (including the burden of persuasion) shifts with respect to causation.[69] Despite the heavy burden this rule places on the violator, the rule is rarely determinative of ultimate liability, for it does not relieve either party of liability for any other relevant faults that may have contributed to the casualty (i.e., breaches of custom and/or negligence).[70]

Though still in effect, the *Pennsylvania* Rule has come under fire in recent years, and is seen by some critics as nothing more than "an idiosyncratic presumption in American admiralty law that has complicated the litigation of collision cases."[71] One of the reasons for such criticism is that presumptions of the sort contained in the *Pennsylvania* Rule were abolished in the international sphere in 1910.[72] However, despite such criticism, the rule survives to this day, and is most often used as a threshold indicator of liability before the courts undertake a more thorough apportionment analysis.[73]

D. *Apportionment*

As alluded to above, in many collision cases (including many involving the United States Navy) more than one

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68. The Pennsylvania, 86 U.S. (19 Wall.) 125, 136 (1874).

69. SCHOENBAUM, *supra* note 50, at 296.

70. *Id.*

71. George Rutherglen, *Not with a Bang but a Whimper: Collisions, Comparative Fault, and the Rule of* The Pennsylvania, 67 TUL. L. REV. 733, 733 (1993). In fact, Rutherglen argues that the *Pennsylvania* rule is totally obsolete and should be retracted altogether. *Id.* at 748. *See also* William Tetley, *The* Pennsylvania *Rule—An Anachronism? The* Pennsylvania *Judgment—An Error?*, 13 J. MAR. L. & COM. 127 (1982) (discussing the history of the *Pennsylvania* rule and giving several reasons for its abolishment).

72. SCHOENBAUM, *supra* note 50, at 300. Schoenbaum describes the *Pennsylvania* rule as a relic "of an earlier time when the law of collision was beset with unrealistic rules," and suggests that it would be helpful if the United States simply "clear[ed] the underbrush" and came into conformity with international practice. *Id.* This sentiment is echoed by Nicholas J. Healy and Joseph C. Sweeney. *See* Healy & Sweeney II, *supra* note 67.

73. Rutherglen, *supra* note 71, at 736, 741. See also the discussion of apportionment in Part II.D.

vessel is found to be at fault for the accident. In such situations, a rule of comparative negligence, or apportionment of fault, is applied to assign the appropriate degree of liability.[74] Although not adopted by the United States until much later, the concept of apportionment of fault on the basis of comparative negligence has been the international law rule for almost a century, having been adopted by the international maritime community at the Brussels Collision Liability Convention of 1910.[75] The U.S. Supreme Court described the doctrine of apportionment as follows:

> [W]hen two or more parties have contributed by their fault to cause property damage in a maritime collision. . ., liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.[76]

Typically, apportionment of damages requires a detailed analysis by the court, requiring it to consider the number and quality of each party's fault(s), and set forth liability in terms of percentages that add up to one hundred percent (100%).[77] In general, this rule is equitable in practice and is applied effectively by courts throughout the world.

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74. SCHOENBAUM, *supra* note 50, at 301.

75. *Id.* Apportionment based on comparative negligence was not adopted by the United States until 1975, when the Supreme Court decided the landmark case of *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). Up to that point, the rule in this country was one of equal division of damages when more than one vessel was at fault. Thus, prior to *Reliable Transfer*, in a two vessel collision, for example, both vessels were required to pay fifty percent of the damages, regardless of their individual degree of fault. If three or more vessels were at fault, the damages were divided into equal fractions. SCHOENBAUM, *supra* note 50, at 301.

76. *Reliable Transfer*, 421 U.S. at 411.

77. SCHOENBAUM, *supra* note 50, at 303. Thus, in a two vessel collision, if one vessel was significantly more negligent than the other in causing the collision, the liability for damages can be split according to that fault (i.e., 80-20 or 70-30). Obviously, the results here are much more equitable than the 50-50 result dictated by the equal division of damages rule applied in the U.S. prior to 1975.

E. *Damages*

Once fault has been determined and liability apportioned accordingly, collision law next turns to the assignment of damages. As a threshold matter, the allocation of damages will be dictated by whether or not the damaged vessel(s) are found to be a total (or constructive total) loss, or whether there is only partial damage to the vessel(s) that justifies repair.[78] In the case of a total loss, the measure of damages will be the market value of the ship plus interest and freight pending, less her salvage value.[79]

When a damaged vessel is not a total (or constructive total) loss, the traditional admiralty precept for fixing damages is *restitutio in integrum*.[80] In fact, for more than one-hundred years, that phrase has embodied the philosophy of the admiralty law of collision damages, and has been cited in over 120 reported decisions in the United States alone.[81] Essentially, *restitutio in integrum* refers to the practice of awarding adequate damages to ensure that the injured vessel(s) can be restored "to the condition in which she was at the time the collision occurred."[82] Despite this ideal, however, damages will still be allocated according to the parties' comparative degrees of fault, as determined by the court when it undertakes its apportionment analysis.[83]

Generally, costs awarded can include reimbursement for any third party claims paid,[84] reasonable salvage expenses, out of pocket costs incidental to a marine casualty (i.e., oil removal, removal of cargo, drydocking, etc. . .), and lost profits.[85] Reasonableness of costs is often an issue with respect to lost profits and other damages, and an owner who claims these items is required to take reasonable

78. *Id.* at 309.

79. *Id.* With respect to a constructive total loss (i.e., a vessel whose damage is repairable, but the cost of repairs will exceed the actual cost of the vessel) the market value of the vessel will be used as a ceiling on any recovery. *Id.*

80. Michael A. Snyder, *Maritime Collision Damage to Vessels and Fixed Structures*, 72 TUL. L. REV. 881, 883 (1997). The doctrine was "officially" adopted by the United States Supreme Court in 1869, when it decided *The Baltimore*. 75 U.S. (8 Wall.) 377 (1869).

81. Snyder, *supra* note 80, at 883.

82. *Id.* at 884 (quoting Justice Nathan Clifford in *The Baltimore*).

83. *See Reliable Transfer*, 421 U.S. at 411.

84. *See* Weyerhauser Steamship Co. v. United States, 372 U.S. 597, 604 (1963).

85. SCHOENBAUM, *supra* note 50, at 311-12.

efforts to mitigate damages and minimize losses.[86] The problems arising from this duty to mitigate can often be avoided, however, if the parties can agree to commission a joint survey to settle the extent of damages and cost of repairs prior to the commencement of those repairs.[87]

F. *Prejudgment Interest*

A final concept of collision law that deserves mention is the practice of awarding prejudgment interest, which is typically addressed after the substantive issues of a given collision case are settled and liability is apportioned.[88] Absent "peculiar" or "exceptional" circumstances that would make an award inequitable,[89] prejudgment interest is generally awarded in collision cases as a matter of equity, and seeks to compensate a given claimant for any actual injury suffered.[90] It is awarded as compensation for the lost use of funds to which a given claimant was entitled, and not as punishment against the opposing party for a wrongful act.[91] The purpose of prejudgment interest, as stated by the Ninth Circuit, is as follows:

> The owner has neither the use of the vessel nor her money equivalent during this period, and interest on her then value is necessary for just compensation. So also with reference to monies expended in repairs or replacements. "Interest here, as in ordinary business transactions, is the usual and ordinary method of making full restitution."[92]

Thus, in accordance with the general maxim of

86. *Id.* at 315.

87. *Id.* at 310.

88. Jeb T. Terrien, Comment: *Prejudgment Interest in General Maritime Law: A Study in Confusion*, 20 TUL. MAR. L.J. 441, 442 (1996).

89. *See* City of Milwaukee v. Cement Div., Nat'l Gypsum Co., 515 U.S. 189, 195 (1995).

90. *See* Terrien, *supra* note 88, at 443.

91. *See id.*

92. *Id.* at 445 (quoting Alkmeon Naviera, S.A. v. M/V Marina L, 633 F.2d 789 (9th Cir. 1980)). Although relatively simple in statement, prejudgment interest is often vexing in practice, and has caused a number of disagreements among the U.S. Circuit Courts. *See* Terrien, *supra* note 88, at 443. One area of contention is the rate of prejudgment interest, which is generally left up to the discretion of the court. However, this is not really an issue when the U.S. Navy is involved, because prejudgment rates of interest for public vessels are dictated by statute. *See infra* Part IV.

restitutio in integrum, prejudgment interest is simply another means of attempting to make the claimant whole.

IV. STATUTORY SCHEME: THE WAIVER OF SOVEREIGN IMMUNITY

Whenever the prospect of suing a government arises (as it does when a United States Naval vessel is involved in a collision), so to does the specter of sovereign immunity. "The concept of sovereign immunity, which shields a government from being sued without its consent, was derived from British legal tradition, and was brought to the American colonies through Blackstone's Commentaries."[93] The doctrine became embedded in the law of the United States and has endured until this day; in fact, generally speaking, the United States cannot be sued unless (1) it consents or (2) the suit is brought pursuant to a statutory exception.[94] Such is the case with respect to admiralty claims against the United States, which can be brought under one of two admiralty waiver statutes: the Suits in Admiralty Act[95] or the Public Vessels Act.[96] As a result of these statutes, the United States is liable in admiralty to roughly the same extent as any private entity.[97]

A. *The Suits In Admiralty Act*

Prior to 1916, actions against the United States government for damages caused by the negligent operation of government vessels were barred by the doctrine of sovereign immunity even though the government was free to sue for damages caused to their own vessels by the negligence of a private shipowner.[98] In an effort to address this inequity, Congress passed the Shipping Act of 1916, which provided that government vessels employed as merchant vessels were subject to all the laws, regulations, and

93. Sue Carter Watson, *The Suits in Admiralty Act*, 17 J. MAR. L. & COM. 175, 176 (1986).

94. *Id.*

95. 46 U.S.C. §§ 741-752 (1994).

96. *Id.* §§ 781-790.

97. SCHOENBAUM, *supra* note 50, at 481.

98. Clayton G. Ramsey & Vivienne Monachino, *Admiralty Claims against the United States*, 5 MAR. LAW 31, 31 (1980).

liabilities that governed private vessels.[99] However, when the Supreme Court construed the Act as allowing proceedings *in rem* against the government (which would allow for the arrest and attachment of government vessels), Congress balked and decided to make a change.[100]

Thus, on March 9, 1920, Congress passed the Suits In Admiralty Act ("the SAA"), which specifically prohibited *in rem* proceedings against the United States, but allowed actions *in personam* against the government where the vessel causing the damage was employed as a "merchant vessel" by the State.[101] In time, the Supreme Court held that the remedy provided by the SAA was exclusive, and that there were no other non-statutory remedies in admiralty against the government.[102] Congress affirmed this conclusion with an amendment in 1950, making it clear that the SAA was the exclusive admiralty remedy against the government, its wholly owned corporations, and its agents operating government vessels.[103]

Under the SAA, suit must be brought within two years after the cause of action arises.[104] According to the weight of authority, this two-year time period for filing suit is "jurisdictional" and cannot be waived or tolled.[105] Exclusive jurisdiction for actions pursuant to the SAA lies in federal

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99. *Id.*

100. *Id.* at 31-32. The Supreme Court decision that spurred Congress into action was *The Lake Monroe*, 250 U.S. 246 (1919).

101. Most law students will recall (with at least some consternation) the concepts of *in rem* and *in personam* jurisdiction from their first year Civil Procedure classes. As a refresher: *In rem* jurisdiction, or jurisdiction over a thing (i.e., a vessel), gives the court power to adjudicate a claim made about a piece of property or about a status. *In personam* jurisdiction, or jurisdiction over the defendant's "person" (i.e.; over the government itself) gives the court power to issue a judgment against the individual personally. For further refreshing, see STEVE EMANUEL, CAPSULE SUMMARIES (Civil Procedure), *available at* http://www.lawschool.lexis.com/lawschool/emanuel/web/civpro2. htm (last visited Oct. 8, 2002).

102. Ramsey & Monachino, *supra* note 98, at 32. The Supreme Court decision is *United States Shipping Bd. Emergency Fleet Corp. v. Rosenberg Bros. & Co.*, 276 U.S. 202, 214 (1928).

103. Watson, *supra* note 93, at 177-78.

104. 46 U.S.C. § 745.

105. *See* SCHOENBAUM, *supra* note 50, at 484. *See also* Ramsey & Monachino, *supra* note 98, at 35 (explaining that failure to meet the statute of limitations is incurable because of sovereign immunity—i.e., "the lapse of the time period extinguishes the consent of the United States to be sued and thus extinguishes the claim itself.")

court,[106] and no action can be filed in state court under any circumstances. Venue under the act is in the district where the government vessel(s) or cargo is found or in the district where the plaintiff resides or has a place of business.[107] The statute also requires that a plaintiff shall "forthwith" serve a copy of his complaint upon the United States attorney for the district, as well as send a copy by registered mail to the Attorney General of the United States.[108] Finally, with respect to prejudgment interest, the SAA allows for such interest back only to the time of the filing of the suit at the rate of four percent (4%).[109]

B. *The Public Vessels Act*

One aspect of the SAA that was immediately perceived as problematic was the fact that suits under the SAA could only be maintained by private parties if the government vessel involved was employed as a "merchant vessel."[110] Thus, if the government vessel involved was a "public vessel," such as a Navy warship, there was still no remedy available.[111] Congress sought to address this problem when it passed the Public Vessels Act ("the PVA") in 1925. Like the SAA, the PVA was intended to impose upon the United States the same liability in the operation of its public vessels as that imposed by the admiralty law upon private shipowners.[112] Thus, the PVA waives sovereign immunity with respect to claims for damages caused by public vessels, and authorizes *in personam* actions against the United States for damage caused by such vessels.[113] In combination

106. 46 U.S.C. § 742.

107. *Id.*

108. *Id.* For a discussion of the consequences of not meeting the "forthwith" requirement, see Watson, *supra* note 93, at 187-89.

109. 46 U.S.C. §§ 743, 745. With respect to the SAA's prejudgment interest requirements, Schoenbaum comments that the restriction against pre-filing prejudgment interest is "contrary to admiralty practice, which grants prejudgment interest from the date of the claim," and that the four percent interest rate is "hopelessly out of date." SCHOENBAUM, *supra* note 50, at 489 n.35.

110. Ramsey & Monachino, *supra* note 98, at 33.

111. *Id.*

112. *Id.* (citing Allen v. United States, 338 F.2d 160, 162 (9th Cir. 1964), *cert. denied*, 380 U.S. 961 (1965)).

113. *Id.* Although the PVA is similar to the SAA in that it waives the sovereign immunity of the United States, the waiver contained in the PVA is

with the SAA, the PVA provides the exclusive admiralty remedy against the United States.

With respect to the specific provisions of the PVA, like the SAA, the PVA also contains a strict two-year statute of limitations and provides the federal courts with exclusive jurisdiction.[114] The PVA choice of venue provision is likewise similar to the SAA, but also provides that if none of the parties suing has an office or residence in the United States, and the vessel or cargo subject to suit is similarly outside the United States, venue in any district court may be proper.[115] Perhaps the most significant difference between the SAA and PVA is the PVA's requirement of reciprocity, which mandates that an alien cannot bring suit unless the foreign state of which he is a national allows nationals of the United States to sue in its courts under similar circumstances.[116] In practice, the reciprocity requirement has been strictly applied.[117] Additionally, unlike the SAA, the PVA does not provide for prejudgment interest, except in contract cases for which it is expressly stipulated.[118] Finally, the PVA contains the unique limitation that no officer or member of the crew of any public vessel may be subpoenaed in connection with any suit brought under the act, without the consent of the responsible Secretary or the commanding officer of the vessel.[119]

C. *The Relationship Between the SAA and PVA*

Initially, the SAA and PVA appeared to complement each other well, with the SAA applying only to government operated merchant vessels and the PVA governing public

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"much more restrictive than the consent to suit of the [SAA]." *See* Peter Child Nosek, *Unifying Claims against the United States: A Proposal to Repeal the Suits in Admiralty Act and the Public Vessels Act*, 30 J. MAR. L. & COM. 41, 45 (1999).

114. 46 U.S.C. § 782. Regarding the statute of limitations, failure of a claimant to meet the 2 year requirement is also considered an incurable fault under the PVA. *See supra* note 105.

115. 46 U.S.C. § 782.

116. *Id.* § 785.

117. *See, e.g.*, United States v. Cont'l Tuna Corp., 425 U.S. 164 (1976) (holding that an alien corporation was barred even though its shares were ninety-nine percent owned by American citizens). *See also infra* Part V.B. for a more thorough discussion of the *Continental Tuna* case.

118. 46 U.S.C. § 782.

119. *Id.* § 784.

vessels. However, as time wore on, confusion arose over the distinction, and "'it became very difficult for litigants and even courts to distinguish between public vessels and merchant vessels,' a problem that was compounded when cargo vessels were used by the government during World War II."[120] Thus, in 1960, Congress passed an amendment to the SAA that deleted the "employed as a merchant vessel" requirement, hoping to solve the many problems that had arisen as a result of the "merchant vessel"/"public vessel" dichotomy.[121] Unfortunately, confusion regarding this distinction persisted.

Some read Congress' action as extending the reach of the SAA to the "full range of admiralty cases" against the government, making the need for the PVA virtually nil.[122] In fact, the Ninth Circuit went so far as to declare that the PVA was redundant in light of the 1960 amendments to the SAA.[123] The Supreme Court, however, reversed the Ninth Circuit and ruled that claims within the scope of the PVA remained as such, even after the 1960 Amendments to the SAA.[124] Critics today are still divided as to whether or not this overlapping statutory scheme is viable. For example, some scholars, such as Peter Child Nosek, argue that both the SAA and PVA should be repealed.[125] In contrast, other critics, such as Sue Carter Watson, contend that despite the 1960 amendment to the SAA, the SAA and PVA remain part of a mutually exclusive complementary scheme, and should be left to operate as such.[126]

Regardless of those opinions, however, the SAA and PVA both remain in effect today and will presumably remain so in the future.

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120. Nosek, *supra* note 113, at 46 (quoting Comment, *The Suits in Admiralty Act: Sovreign Benevolence in Need of Reform*, 7 MAR. LAW 283 (1982)).

121. *Id.* at 48-49.

122. *Id.*

123. *Id.* at 50.

124. United States v. Cont'l Tuna Corp., 425 U.S. 164 (1976)

125. *See, e.g.*, Nosek, *supra* note 113 (arguing that both the SAA and PVA should be repealed, leaving maritime tort claims to be brought in the U.S. Court of Federal Claims under the Tucker Act and a re-vamped Federal Tort Claims Act).

126. *See, e.g.*, Watson, *supra* note 93.

V. THE UNITED STATES NAVY IN COURT

When Congress enacted the PVA in 1925, one of the motivating factors was that in the three years previous, there had been more than 450 collisions involving government vessels in public service.[127] Thus, from the beginning, it was relatively obvious that public vessels were no strangers to collision. The same can be said of the United States Navy, which has found itself in court fairly frequently, even in just the past fifty years. From aircraft carriers and destroyers to ammunition ships and submarines, the ships of the United States Navy have been involved in their fair share of collisions at sea.

A. USS Saratoga

In April 1968,[128] the U.S. Court of Appeals for the Fourth Circuit decided a case involving a collision between a United States Navy aircraft carrier, the *USS Saratoga* (CVA 60), and a German-flagged freighter and ore carrier, the *M.S. Bernd Leonhardt*.[129] Despite near perfect weather conditions, a long observation of one another, and the exchange of a "cheery greeting," the two vessels collided in open waters off the coast of North Carolina.[130] The district court found the *Bernd Leonhardt* solely at fault for the collision, and absolved the *Saratoga* completely; the *Bernd Leonhardt* appealed.[131]

On appeal, the Fourth Circuit refused to accept the district court's ruling absolving the aircraft carrier of fault in the collision. The appellate court instead looked at the

127. Nosek, *supra* note 113, at 45 (citing a Senate Claims Committee report supporting the PVA).

128. Note that this case occurred in 1968, about seven years prior to the Supreme Court's landmark admiralty decision adopting the rule of apportionment in *Reliable Transfer*. *See supra* Part III.D. Thus, at the time of this decision, if both vessels displayed fault, the division of liability was automatically fifty-fifty. Note as well that this case was also pre-COLREGS (adopted in 1972). Still, the application of the then existing rules of the road by the Fourth Circuit is enlightening.

129. Partenreederei M. S. Bernd Leonhardt v. United States, 393 F.2d 756 (4th Cir. 1968).

130. *Id.* at 757. The "cheery greeting" reported by the court was a "bon voyage" sent from the *Saratoga* to the *Bernd Leonhardt* via flashing light signals. *Id.* at 758.

131. *Id.*

Saratoga's actions in the ten minutes prior to the collision, which included a series of violations of the Rules of the Road, as grounds for reversal.[132] Despite the fact that her role as the stand-on ("privileged") vessel dictated otherwise, and in direct violation of the International Rules of the Road, the *Saratoga* had engaged in various course changes immediately prior to the collision.[133] Thus, in light of the *Saratoga*'s failure to follow the rules, the Fourth Circuit held that there was insufficient ground to exonerate the carrier completely, and therefore it should have been held equally at fault with the *Bernd Leonhardt*.[134]

B. USS Parsons

One of the most significant collisions involving a United States Navy vessel occurred in late 1969, when the *USS Parsons* (DDG 33) collided with the Philippine fishing vessel *M/V Orient*. The *Parsons* collision was significant for two reasons: first, because it resulted in the total loss of the *Orient*, which sank as a result of the impact; and second, because the resulting litigation forced the Supreme Court to interpret the effect of the 1960 Amendments to the SAA on that Act's relationship with the PVA.[135]

The suit in this case was initially brought pursuant to the SAA and PVA in the U.S. District Court for the Central District of California by Continental Tuna, Inc., the Philippine corporation that owned the *M/V Orient*. The District Court granted the United States' motion for summary judgment on reciprocity grounds, and dismissed the complaint.[136] On appeal, the Ninth Circuit reversed that decision, holding that even though the *Parsons* was a public vessel, because of the 1960 Amendments to the SAA, the appellant's action was maintainable under that Act, which

132. *Id.*

133. In accordance with Rules 19 and 21 of the International Rules of the Road in effect at the time, the *Saratoga* was required to maintain her course and speed and keep out of the way of the *Leonhardt* unless emergency or necessity dictated otherwise. *See id.* at 761 (Bryan, J., concurring) (citing 33 U.S.C. §§ 146(c) and 146(e)). Obviously, by changing course repeatedly with no apparent necessity and in the light of no emergency, the *Saratoga* failed in this regard.

134. *Id.* at 759.

135. *See supra* Part IV.C.

136. United States v. Cont'l Tuna Corp., 425 U.S. 164, 165-66 (1976).

has no reciprocity provision.[137] The United States understandably took exception to that ruling and the Supreme Court granted certiorari.[138]

The Supreme Court's decision focused on the relationship between the SAA and PVA, and looked primarily at "whether Congress intended, by the deletion of the 'employed as a merchant vessel' proviso from the [SAA], to authorize the wholesale evasion of the restrictions specifically imposed by the [PVA] on suits for damages caused by public vessels."[139] After a thorough exploration of the history behind both the SAA and PVA, the Court concluded that even after the 1960 amendments to the SAA, claims within the scope of the PVA were to remain subject to its terms.[140] Thus, because there was no dispute that Continental Tuna's claim fell within the embrace of the PVA, the Court held the Ninth Circuit ruling to be in error and reversed, remanding the case for further proceedings.[141]

C. USS Chandler

On June 6, 1985, the *USS Chandler* (DDG 994), a United States Navy guided missile destroyer was steaming up the Columbia River en route to Portland, Oregon for the city's annual Rose Festival.[142] Simultaneously, the tug *Mary B* was pushing a pair of barges loaded with wood chips downstream.[143] As the two vessels passed one another, a swell caused by the *Chandler*'s passage swept under the *Mary B* and her barges, causing damage to one of the barges and the loss of most of its cargo.[144] The owners of the *Mary B* subsequently brought suit under the PVA for the damage caused by the *Chandler*'s unruly swell.

Although the damage in this case was not caused by a collision *per se*, the District of Oregon recognized that the

137. Cont'l Tuna Corp. v. United States, 499 F.2d 774 (9th Cir. 1974). The Ninth Circuit's logic was essentially that the 1960 Amendment to the SAA erasing the distinction between "merchant" vessels and "public" vessels had made the action maintainable under either act.

138. 420 U.S. 971 (1975).

139. *Cont'l Tuna*, 425 U.S. at 169.

140. *Id.* at 181.

141. *Id.* at 181-82.

142. Bernert Towboat Co. v. USS Chandler (DDG 996), 666 F. Supp. 1454, 1456 (D. Or. 1987).

143. *Id.*

144. *Id.*

term "collision" can be broadly construed so as to include damage caused by a tug striking another ship's wake.[145] In fact, in light of the *Chandler*'s statutory duty to maintain a safe speed and exercise reasonable care as it traveled up-river and the fact that she had been traveling at over twenty knots,[146] the *Mary B*'s cause of action against the *Chandler* was basically a foregone conclusion.[147] The *Chandler's* excessive speed was a clear-cut statutory violation; thus, the burden of proof (and persuasion) shifted to her under the *Pennsylvania* Rule,[148] forcing her to prove that her fault (i.e., not maintaining a safe speed) could not have been a cause of the accident.[149] In light of all the evidence, the court concluded that the *Chandler* had indeed violated the safe speed rule and breached her duty to exercise reasonable care to avoid creating a dangerous swell.[150] Thus, the court held the *Chandler* one hundred percent (100%) at fault for the collision, and assigned damages accordingly.

D. USS Mount Baker

As the three previous cases discussed in this Part demonstrate, more often than not, collisions at sea involve only a pair of vessels. There are times, however, when multi-vessel collisions occur, and the Navy is not immune from these types of collisions either. One such multi-vessel collision involved the *USS Mount Baker* (AE 34), a United States Navy ammunition ship. In the early morning hours of March 24, 1989, the *Mount Baker* was involved in a three-vessel collision with the tug *Starcrescent* and the tow *TMI-96*, which, in tandem with the *Starcrescent*, was transporting fertilizer from the Gulf of Mexico to Virginia.[151] At the time of the collision, the *Mount Baker* was engaged

145. *Id.* at 1457 (citing Peoples Natural Gas Co. v. Ashland Oil, Inc., 604 F. Supp. 1517, 1523 (W.D. Pa. 1985)).

146. *Id.* at 1458.

147. *See id.* at 1457 (discussing the traditional duty of larger vessels to *not* create dangerous swells). *See also* 33 U.S.C. § 2006, which contains the Safe Speed Rule applicable in this situation.

148. *See supra* Part III.C.

149. *Bernert Towboat*, 666 F. Supp. at 1457.

150. *Id.* at 1459.

151. United States Fire Ins. Co. v. Allied Towing Corp., 966 F.2d 820, 822 (4th Cir. 1992).

in a search and rescue mission in the vicinity of the Chesapeake Bay with a group of Coast Guard and Navy ships.[152]

After the collision, Allied Towing, the owner of the *Starcrescent*, filed a claim against the United States pursuant to the PVA; the United States filed a counterclaim against both Allied and the *Starcrescent* itself. During a five-day bench trial, the district court made findings that both the *Mount Baker* and *Starcrescent* had been operating in violation of the rules of the road, and were therefore at fault in the collision; the court found that *TMI-96*, an unmanned barge, was not at fault.[153] Having decided that both the *Mount Baker* and *Starcrescent* were at fault, the court next considered the issue of damages, which it apportioned equally between the two.[154] There were numerous appeals from the court's ruling, including one from Allied Towing based on apportionment.[155] On appeal, the Fourth Circuit held that the district court's ruling on apportionment was not clearly erroneous; for, the testimony below made it clear that both the *Mount Baker* and the *Starcrescent* were violating the rules of the road at the time of the accident.[156] Additionally, Allied Towing argued that *TMI-96* had also violated the rules of the road by failing to display proper navigation lights, but the Fourth Circuit disregarded that argument, upholding the district court's conclusion that it would not have made "one iota of difference one way or the other" whether the barge's navigation lights were on.[157] The Fourth Circuit thus affirmed the dis-

152. *Id.*

153. *Id.* at 823. Specifically, the district court found that the *Mount Baker* was not making proper use of its radar, was not sounding fog signals, and was traveling at an excessive rate of speed. As for the *Starcrescent*, the court found that its use of a 2000-foot towline was unnecessarily risky, and that it also failed to make proper use of its radar, was not sounding fog signals, and was traveling at an excessive rate of speed. *Id.*

154. The total amount of damages the two vessels were required to split was approximately $816,000.00. *Id.*

155. *Id.*

156. *Id.* at 824.

157. *Id.* at 825. The court's ruling regarding *TMI-96* highlights one of the exceptions to the general rule that violation of a navigational statute imposes liability; namely, that non-contributory violations of the statutes can be excused. *See* Brown, *supra* note 48, at 830-31.

trict court's apportionment ruling, and remanded the case for reconsideration of the damages award.[158]

E. USS Virginia

As noted earlier, the importance of following the rules of the road cannot be overemphasized, and this is a fact that the United States Navy definitely recognizes.[159] However, the Navy's commitment to ensuring that its own personnel are well versed in the rules does not always prevent collisions; for, sometimes the failure of other vessels to follow the rules can lead to collisions as well. Such was the case in February 1991, when the U.S. Navy nuclear cruiser, the *USS Virginia* (CGN-38), collided with and sank the Greek fishing vessel *Vassilios I.*[160]

The *Virginia* was returning from the Persian Gulf, where it had participated in Operation Desert Storm, and was transiting the Straits of Andikithiron off the coast of Crete, en route to a port visit in Souda Bay, Crete.[161] The *Vassilios I* was underway in those same waters fishing for swordfish.[162] On the evening of February 22, 1991, as the crew of the *Vassilios I* was collecting her fishing line, they discovered that the line had somehow been cut, and commenced a search for the missing line.[163] The search continued into the early hours of February 23, and thoroughly absorbed the attention of the entire crew, so much so that they lost touch with their surroundings, and neglected to consult their radar.[164] The *Virginia*, meanwhile, continued to track the smaller fishing vessel, and established that the two would pass safely within approximately two-thousand yards of one another.[165] Unfortunately, those esti-

158. *Allied Towing*, 966 F.2d at 830.

159. For example, from personal experience, I know that at the Navy's Surface Warfare Officer's School in Newport, Rhode Island, the very first subject that is addressed is the Rules of the Road. In fact, the entire first week of the approximately sixteen week training program is dedicated solely to learning and understanding those fundamental rules. Also, I can personally attest that once out of school and out at sea, training to ensure Rules of the Road proficiency is regular as well.

160. *See* Paterakis v. United States, 849 F. Supp. 1106 (E.D. Va. 1994).

161. *Id.* at 1107.

162. *Id.*

163. *Id.*

164. *Id.* at 1109.

165. *Id.* at 1108-09.

mates turned out to be optimistic, and the vessels subsequently collided.

Although the *Virginia* was directly involved in the collision, the Eastern District of Virginia held that she was in no way responsible for the damage that occurred. The court held that *Virginia* had complied with the rules of the road and had operated prudently and properly under the circumstances.[166] As for the *Vassilios I*, the court held that the fishing vessel's numerous violations of the rules of the road were the direct cause of the collision.[167] Therefore, the plaintiffs (the Captain of the *Vassilios I* and some of the crewmembers) were held to have failed to meet their burden of proof, and the United States was spared of liability for any injuries or damages suffered.[168]

F. USS Jacksonville

As the *Greeneville-Ehime Maru* incident vividly attests, collisions at sea involving Naval vessels are not limited to surface ships—submarines get into accidents as well. An example of this truism that predates the *Greeneville* incident is the collision that occurred between the *USS Jacksonville* (SSN 699) and the *M/V Saudi Makkah* in May 1996.[169] Unlike some of the other collisions discussed in this section, the visibility at the time the *Jacksonville* and *Saudi Makkah* collided was poor due to fog.[170] As a result,

166. *Id.* at 1112.

167. *Id.* at 1112-13. Specifically, the court held that the *Vassilios I* had violated the rules of the road by: (1) failing to maintain a proper lookout; (2) failing to assess the risk of collision using all available means, including radar if installed; and (3) failure to properly discharge their statutory duty as "give-way" vessel (i.e., maneuvering to avoid the "stand-on" vessel (i.e., the *Virginia*)). *Id.*

168. *Id.* at 1111-13.

169. *See* Nat'l Shipping Co. of Saudi Arabia v. United States, 95 F. Supp. 2d 482 (E.D. Va. 2000). Note that the plaintiff in this case is the same shipping company that owns the *M/V Saudi Riyadh*, the ship involved in the *Radford* collision. *See supra* Part I and *infra* Part VI for further discussion of the *Radford* collision.

170. *Nat'l Shipping Co. of Saudi Arabia*, 95 F. Supp. 2d at 485. At trial, both parties stipulated that as a result of the fog, they were operating in restricted visibility within the meaning of the Rules of the Road. An obvious question here is why fog should be a concern at all for a *sub*marine? The answer is that submarines do not always travel underwater. Most often, while transiting through shipping channels, as was the situation in the case at bar, submarines will stay on the surface. In these situations, the COLREGS treats

both vessels were required by law to sound appropriate sound signals and maintain a safe speed appropriate for the conditions. Although each vessel sounded the appropriate sound signals, neither heeded the safe speed requirement, and the court found that the speed of each vessel was "excessive and unsafe given the restricted visibility."[171] Therefore, from the outset, it was clear that both vessels had violated a statutory provision and could be held liable for that fault.

In order to determine the exact degrees of fault, the court undertook the standard apportionment analysis common to collision cases post-*Reliable Transfer*.[172] Specifically, the court acknowledged that both vessels were at fault because of their unsafe speed, but held that the *Jacksonville* was to bear the greater burden because she was the first vessel to turn to port, an action frowned upon in maritime law since the mid-nineteenth century.[173] Thus, the court allocated responsibility for the damages at eighty percent (80%) for the *Jacksonville*, and twenty percent (20%) for the *Makkah*.[174]

A final aspect of this case worth mentioning concerns pre-judgment interest. As noted in Part IV.B. above, the PVA does not allow for prejudgment interest unless expressly stipulated in a contract.[175] Thus, in a case such as this, where the National Shipping Company of Saudi Arabia brought their action pursuant to the PVA, no prejudgment interest could be awarded on their claim. With respect to the United States, however, the question of a prejudgment interest award is significantly different. The United States brought their claim under general admiralty law, which calls for the awarding of pre-judgment interest as a matter of routine.[176] Therefore, although the *Jacksonville* bore the majority of fault for the collision, the

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submarines the same as any other power-driven surface vessel.

171. *Id.* at 489.

172. For a more thorough discussion of the *Reliable Transfer* decision and the concept of apportionment in general, see *supra* Part III.D.

173. *Nat'l Shipping Co. of Saudi Arabia*, 95 F. Supp. 2d at 490-92. *See also supra* note 38 and accompanying text.

174. *Nat'l Shipping Co. of Saudi Arabia*, 95 F. Supp. 2d at 494.

175. 46 U.S.C. § 782.

176. *See* City of Milwaukee v. Cement Div., Nat'l Gypsum Co., 515 U.S. 189 (1995) (holding that pre-judgment interest is to be awarded routinely in admiralty cases).

United States was deemed able to collect pre-judgment interest running from the date of the casualty.[177]

VI. CASE STUDY: *USS ARTHUR W. RADFORD*

In the Introduction to this paper, I set forth the background of the 1999 collision between the *USS Arthur W. Radford* and the *M/V Saudi Riyadh*. As I mentioned in that section, the *Radford* incident was one that effected me profoundly at the time, primarily because that ship and her crew were virtually indistinguishable from my own crew on *Hayler*. Thus, I followed the events that occurred in the aftermath of the collision, including the ensuing trial, with great interest. Although I was not aware of it at the time the events occurred (and never conceived of actually writing an essay covering those events), the proceedings that flowed from the *Radford/Riyadh* collision are instructive on a number of the key collision law concepts discussed in this paper. Therefore, I will detail those proceedings below.

A. *Pre-trial Filings*

The Navy did not waste any time in initiating the legal proceedings in this matter, and filed a complaint with the District Court for the Eastern District of Virginia exactly one week after the collision, blaming the *Riyadh* for the accident and estimating damages at approximately $65 million dollars.[178] Shortly thereafter, the owners of the *Riyadh* responded, denying the government's allegations and filing a cross-claim on their own behalf.[179] In light of the Navy's large damage assessment, the owners of the *Riyadh* also took the preemptive strategic step of attempting to limit their liability in the matter by contending that the

177. *Nat'l Shipping Co. of Saudi Arabia*, 95 F. Supp. 2d at 495-97. The court acknowledged this anomalous result, but felt itself bound nonetheless to "apply the statutory scheme set forth by Congress." *Id.* at 496.

178. *See* Jack Dorsey, *Saudi Filing Blames Navy for Feb. 4 Collision at Sea*, THE VIRGINIAN-PILOT, Feb. 19, 1999, at A1. The Navy did not actually file the papers on its own behalf, however. The suit was filed by the Department of Justice.

179. *See id.* In their cross-claim, the owners of the *Riyadh* listed a number of alleged violations of the Rules of the Road by the *Radford*, including altering course to port, failure to maintain a lookout, and failure to sound proper whistle signals.

value of the *Riyadh* and her cargo was only worth $7.3 million.[180] Damages to the *Riyadh* were estimated at approximately $1.1 million.[181]

The case went to trial (without jury) before Judge Rebecca Beach Smith on January 24, 2000.

B. *Fault and Apportionment*

Following two weeks of trial and the presentation of much testimony and evidence, the court's initial tasks were to determine fault and apportion liability.[182] After closely examining the facts presented, the court determined that both the *Radford* and the *Riyadh* were negligent in this case.[183] Both vessels were found guilty of violating the Rules of the Road as well, and the court held that those violations directly contributed to the accident.[184] Specifically, the court held that the *Radford* had violated Rule 17 of the COLREGS (governing the actions of the stand-on vessel in a crossing situation) and Rule 5 (requiring vessels to post a proper lookout).[185] As for the *Riyadh*, the court found her in violation of Rule 16 (governing the actions of the give-way vessel), Rule 8 (governing actions to be taken to avoid a collision), Rule 7 (mandating use of every available means

180. *Id.* Maritime Law generally limits the value of a claim such as the Navy's to the value of the ship, its cargo and tackle at the time of the accident.

181. *See* Jack Dorsey, *8 Radford Sailors Sue Saudi Firm for Damages*, THE VIRGINIAN-PILOT, June 11, 1999, at B1. Also, as the headline for this article indicates, a group of *Radford* sailors injured on the night of the collision brought separate suits on their own behalf. The suits of the personal injury claimants were all ultimately settled. *In re* Nat'l Shipping Co. of Saudi Arabia, 147 F. Supp. 2d 425, 430 n.1 (E.D. Va. 2000).

182. *Id.* at 430. The Judge's assessment of the situation was as follows:

> After over two weeks of trial, it remains inconceivable to the court that two large ships, both properly equipped with radar and properly lighted, collided in the open ocean on a clear night, with no other ship traffic in the vicinity restricting their maneuverability or visibility. Nonetheless, such a collision did occur, and the court must now assess the evidence before it, allocate the fault, and determine issues of liability and limitation.

Id.

183. *See id.* at 430-40. The Court does a very thorough job of spelling out all the facts in this case.

184. *Id.* at 438-39.

185. *Id.* at 439.

to avoid collision), and Rule 34 (requiring sound signals in certain circumstances).[186]

Given that both vessels were clearly at fault, the court's next task was to allocate that fault under the principles of comparative negligence, and apportion liability accordingly. The court found that the majority of the fault lay with the *Riyadh*, and held that she was sixty-five percent (65%) at fault for the collision; the *Radford* was assigned the balance of the blame, and was held to be thirty-five percent (35%) at fault for the mishap.[187]

C. *Assessment of Damages*

Once liability was established and fault allocated, the court was able to focus on allocation of damages. As noted above, the owners of the *Riyadh* attempted to limit their liability to the cost of the ship and its cargo (approx. $7.3 million dollars). Before addressing liability directly, the court spent a good deal of time examining the owners' request, and ultimately granted it.[188] The court then closed the initial proceedings, ordering both parties to submit findings of fact and conclusions of law on the issue of damages within a nine-day period.[189]

Upon receipt of the requested information, the court resumed its deliberations. In determining damages, the court recognized that, as a threshold matter, "'*restitutio in integrum* is the precept in fixing damages' in admiralty," but that damages "must be allocated according to the parties' comparative degrees of fault."[190] Thus, the court's earlier decision that fault would be allocated 65/35 was a controlling factor. Another important factor in determining

186. *Id.* at 438-39.

187. *Id.* at 440.

188. *See id.* at 440-46. The court's decision to allow a limit on the owner's liability was a major victory for the *Riyadh*, because without the limit, they could have been held liable for up to sixty-five percent (65%) of the *Radford*'s thirty-two million dollar repair bill (roughly $20.8 million dollars!). *See* Jack Dorsey, *Saudi Ship, Radford Share Blame, Judge Limits Damages Due to Navy from Collision at Sea Off Virginia Beach*, THE VIRGINIAN-PILOT, June 23, 2000, at B1.

189. *Nat'l Shipping Co. of Saudi Arabia*, 147 F. Supp. 2d at 446. The opinion was handed down on June 21, 2000, and the parties were required to submit their materials on or before June 30, 2000.

190. *In re* Nat'l Shipping Co. of Saudi Arabia, No. 2:99CV223, 2000 U.S. Dist. LEXIS 19956, at *6 (E.D. Va. July 31, 2000).

damages was the claimant's duty to mitigate—a duty that the owners of the *Riyadh* claimed the Navy had failed to meet.[191] The court, however, found otherwise, and held that the repairs to the *Radford* had been conducted appropriately.[192] Therefore, the court awarded the United States the maximum liability available—$7.3 million—less the $120,000.00 the owners of the *Riyadh* had paid earlier to settle the personal injury cases.[193] No damages were awarded to the owners of the *Riyadh*, however, because such damages were considered in the court's earlier decision to limit the owners' liability, and a "second" award at this point was considered inequitable.[194]

D. *Prejudgment Interest*

The final aspect of this case discussed by the court was the issue of prejudgment interest. The court recognized that prejudgment interest is generally awarded in admiralty cases, absent peculiar or exceptional circumstances because it is essential to ensuring "full and fair compensation" to the injured party.[195] The court also noted that it retained broad discretion in establishing the rate for pre-judgment interest.[196] Thus, the Court awarded pre-judgment interest to the United States, at a rate of 4.584%, compounded annually from the date of the collision.[197]

VII. CONCLUSION: PREDICTIONS FOR THE *EHIME MARU*

In the months since the *USS Greeneville* sent the *Ehime Maru* to the bottom of the Pacific Ocean, much has occurred, including threats of legal action from some of the

191. *See id.* at *7-*8. Specifically, the owners of the *Riyadh* argued that the Navy had failed to mitigate by choosing the more expensive repair option (i.e., opting to have the entire bow of the ship replaced rather than rebuilt) and choosing to conduct the repairs at a more expensive shipyard.

192. *See id.*

193. *Id.* at *9.

194. *See id.* at *9 n4.

195. *Id.* at *10. The Court also recognized in a footnote that under the PVA no prejudgment interest would have been allowed the owners of the *Riyadh* had they not already limited their liability.

196. *Id.* at *11-*12.

197. *Id.* at *12-*13. 4.584% is the statutory suggested rate set forth by Congress in 28 U.S.C. § 1961 (2000).

Japanese citizens affected by this tragedy.[198] Perhaps the most important event, although not necessarily of direct legal significance, was the momentous six-week, $60 million dollar effort by the Navy to raise the *Ehime Maru* and attempt to recover the remains of those declared missing.[199] The highly successful effort, which resulted in the recovery of all but one of the nine missing victims, was extremely important from a public relations standpoint and eased the pain of the Japanese families that had lost their fathers, sons, and brothers.[200] However, despite the valiant U.S. recovery effort, compensation is still being discussed, and the victims of the *Ehime Maru* incident may yet have their day in court.

The first question that comes to mind when discussing the possibility of a suit by Japanese citizens against the United States is: Can there be a suit? For example, under the PVA, the statute that would govern any action against the United States, there is a strict requirement of reciprocity.[201] Thus, in order for a Japanese citizen to be eligible to bring suit, the claimant would have to establish that a similarly situated United States citizen would be able to bring an analogous suit in Japan. Thomas Schoenbaum addressed this question shortly after the incident, and discovered that a United States citizen would indeed be able to sue under Japanese law;[202] the reciprocity requirement is therefore satisfied.

The question of venue is currently something of a wildcard in this matter, because the potential claimants are

198. *See As* Ehime Maru *Search Ends, Focus Shifts to Compensation*, DAILY YOMIURI, Nov. 27, 2001, at 3 [hereinafter *Compensation*]; Christopher Cottrell, *Japanese Kin Seek Solace for Sea Losses*, BOSTON GLOBE, Nov. 4, 2001, at A9; *Lawyers of 2 Victims of* Ehime Maru *Plan to Sue U.S. Government*, JAPAN ECON. NEWSWIRE, Nov. 22, 2001.

199. *See Body Recovery Done, Japanese Ship Hit by U.S. Sub is Scuttled*, CHICAGO TRIBUNE, Nov. 26, 2001, at N15; Howard W. French, *U.S. Makes Amends to Japan for Sinking of Ship*, N. Y. TIMES, Nov. 5, 2001, at A6; James Sterngold, *Navy's Recovery Effort Begins for Trawler Sunk in Accident*, N. Y. TIMES, Oct. 13, 2001, at A8.

200. *See* Yasuo Shinomiya, *U.S. Deserves Praise for* Ehime Maru *Recovery*, DAILY YOMIURI, Nov. 15, 2001, at 17.

201. *See supra* Part IV.B.

202. *See* Thomas J. Schoenbaum, *The* Ehime Maru *Incident and the Law*, ASIL Insights (March 2001), *available at* http://www.asil.org/ insights/ insigh64.htm (last visited Oct. 19, 2002). Schoenbaum specifically cites Article 6 of the Kokka Baisyou Ho as support for that conclusion.

all Japanese nationals with no American interests. In such a case, the PVA dictates that if none of the parties resides or has an office in the United States and the collision occurred outside U.S. territorial waters, then the suit can be brought in any United States District Court.[203] Whether the collision occurred inside or outside U.S. territorial waters is currently in dispute for other reasons.[204] Thus, the exact venue cannot be determined at this point. However, assuming the accident occurred inside U.S. territorial waters, the venue would have to be the District of Hawaii (i.e., the district in which the collision occurred). Otherwise, the venue will be up to the claimants, and their preference, if any, is currently unknown.

Another important question is to determine how long the victims are eligible to sue. Given that the statute of limitations under the PVA is two years,[205] any action against the United States must be filed by February 9, 2003. Thus, any party contemplating suit still has roughly six months in which to file.

A factor that lies in favor of any party contemplating suit is the fact that the United States has already accepted full responsibility for the collision.[206] Therefore, no comparative negligence or apportionment of fault analysis would apply in this case. The United States acceptance of responsibility is tantamount to a stipulation that they are one hundred percent (100%) liable for this accident. Given this acceptance of liability on behalf of the United States, the question then becomes one of determining exactly what types of damages are available.

With respect to the owners of the *Ehime Maru*, they would be entitled to the full replacement cost of their lost vessel under the principle of *restitutio in integrum*. The responsibility of the court would be to accept proposed costs by both sides and determine a fair amount of compensation. At a public auction on November 28, 2001, the prefectural government that owned the *Ehime Maru* set the replacement cost for the vessel at approximately 1.06 billion yen (approximately 7.5 million US Dollars), a figure that the

203. 46 U.S.C. § 782.
204. *See Compensation*, *supra* note 198.
205. *See supra* Part IV.B.
206. *See Compensation*, *supra* note 198.

United States contests.[207] The Navy contends that depreciation on the vessel must be considered, because the ship was originally built four years ago.[208] Thus, unless the two sides come to an agreement, the court may have to make a decision regarding fair compensation.

With respect to the victims of the collision, the United States government has already agreed to cover the costs of any mental health treatment required by survivors diagnosed as having post-traumatic stress disorder.[209] The gesture of goodwill by the United States has been graciously accepted, but does not preclude anyone from bringing suit. The U.S. Government has also been working diligently with representatives of the families of seven of the victims to work out a settlement in this case.[210] However, at their latest meeting, the families rejected the U.S. offer as being too low.[211] One reason for the impasse is that the United States contends that the vessel was sunk in international waters, where the law does not have any provision for compensating emotional pain and suffering.[212] Thus, the United States argues that any emotional pain should be covered by Japan's Civil Code, which would significantly decrease the amount of the settlement.[213] The families, however, contend that the incident occurred in U.S. territorial waters, which would allow the case to be governed by the more liberal U.S. laws allowing compensation for emotional pain.[214] Given that the families base their argument on a 1998 U.S. Presidential ordinance extending

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207. *U.S. Navy, Ehime Government Remain Apart on Redress for Sunken Ship*, JAPAN ECON. NEWSWIRE, Dec. 15, 2001.

208. *Id.*

209. *See Compensation*, *supra* note 198. Currently, about half of the twenty-six survivors have been diagnosed as suffering from PTSD. *See 2* Ehime Maru *Crew Members Suffering PTSD to be Compensated*, JAPAN ECON. NEWSWIRE, June 18, 2002.

210. *See U.S. Navy Presents Compensation Amount for* Ehime Maru *Victims*, JAPAN ECON. NEWSWIRE, Dec. 14, 2001. The families of two of the nine victims have hired a team of lawyers outside the main group to discuss compensation with the U.S. on their own and explore the possibility of suit. *See Compensation*, *supra* note 198. As of August 2002, the U.S. Navy was preparing to enter informational talks with those families. *See U.S. Navy to Set Meeting for Kin of Two* Ehime Maru *Victims*, JAPAN ECON. NEWSWIRE, Aug. 12, 2002.

211. *See 7* Ehime Maru *Families Reject U.S. Offer*, DAILY YOMIURI, Dec. 16, 2001, at 2.

212. *See Compensation*, *supra* note 198.

213. *See id.*

214. *See id.*

the reach of U.S Territorial waters,[215] it is difficult to speculate how a court would rule on this matter.

At this point, however, no suits have officially been brought, and all parties are still displaying a willingness to negotiate. Thus, we can only wait and see if the legal framework described in this paper will be played out in full.[216]

215. *See id.*

216. In April 2002, the U.S. Navy and Japan's Ehime prefectural government signed an accord for about $11.47 million in compensation for damages suffered by the local government over the incident, including loss of the ship and provision of financial aid and counseling to survivors. Compensation talks with the families of the deceased (minus the two families who have decided to pursue a separate course of action) continue. *See U.S to Expedite Resolving* Ehime Maru *Compensation Issue*, JAPAN WEEKLY MONITOR, May 20, 2002.